The Legal Status of Milk Control by the Agricultural Adjustment Administration

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Milk is a "peculiar product". Milk has a different status at law from other products of the farm, such as fruits, vegetables and grains. This is so because it is highly perishable; must be kept pure; it is produced daily; and must be handled immediately since it cannot be stored as such for future use. A pound of butter fat in the form of cream can be transported 400 miles for the same cost of transporting 50 miles a pound of butter fat in milk. Milk is not marketed in the usual way. It is sold in most of the metropolitan markets on the classified price plan. It has long been the subject of legislation and of ever-increasing regulation by governmental authority. Up until recent years it was believed that the economic law of supply and demand would correct the evils existing in the marketing of this product. But the depression has aggravated these evils and has clearly shown that we cannot depend entirely upon this economic law to control conditions. Because such a large part of the farmers' income is derived from milk, we may say its production and distribution is "affected with a public interest"; that milk is a "peculiar product", because of the methods employed in marketing it.

We will concede that milk is not a public utility in the generally accepted use of this term. But what do we mean by the term "a public utility"? If one not familiar with our subtle reasoning were told that the government regulated businesses "affected with a public interest", would he understand us? In all probability he would think we referred to the necessities of life, that is, food, shelter and clothing, for the public certainly has an interest in these things. But we must tell him that the business of distributing the food and clothing to and the housing of the people is a "private business". If we wish him to understand what we have in mind when we use the term "public utility" we should explain that by the term "public utility" we mean a business which the public itself might undertake or one which relies upon a grant or franchise from the government for the right to do business or a business in its nature a monopoly.

The government may regulate and control a public utility for the benefit of the people. The production and distribution of milk is not such a business. May the government then control it and fix the prices thereof? One of the functions of government is to correct existing evils which affect a large proportion of the people. There exists today a public demand that the evils existing in the marketing of fluid milk be corrected. Many of the states have passed milk control laws for the purpose of regulating the price thereof. To those of us who are familiar with the marketing of milk in the metropolitan markets of our country we see the need for some governmental control. This is true in part because milk is sold on the classified price plan. Under this plan milk sold in fluid form brings more than that sold in the form of cream and milk sold in the form of cream brings more than that sold in the form of butter.

Under the classified price plan governmental control of the fluid milk markets is necessary for two reasons: (1) to see that farmers are paid for their milk in accordance with its actual use and value and (2) to equalize the cost of milk among distributors in order to prevent discriminations among farmers and distributors. Any flat price which is fair to producers for fluid milk markets will be unfair to some distributors. And any flat price which does not discriminate as between distributors will be unfair to producers because such a price cannot be much above the value of the product for its use as butter.

Having hastily reviewed the necessity for government control of this "peculiar product" let us examine some of the recent cases before the courts which involved the legality of the milk licenses promulgated by the Secretary of Agriculture under Section 8 (3) of the Agricultural Adjustment Act. At a banquet given by the Federal Bar Association in Washington in honor of our present Chief Justice, Chief Justice Hughes said that the duty of the lawyer was to present to the court a clear, concise statement of the facts; that when the facts were clearly established the case could then be decided with justice.

The cases involving our federal milk licenses may be classified as follow: (1) suits which involve "intrastate" markets; that is, markets in which little, if any, fluid milk is sold which is produced outside of that state, and (2) suits which involve "interstate" markets; that is, markets in which large quantities of fluid milk produced in other states are sold. Many of the recent cases have arisen in markets such as Baltimore, Indianapolis, Des Moines, Los Angeles, etc. In these markets the question of interstate commerce was the controlling principle upon which the district judge rendered his decision. In seven cases the court held, on the record before it, that the federal government had no authority to regulate the dairies involved since each of said dairies purchased and sold all of its supply of milk within the state in which the sales area was located and hence it was not engaged in "interstate" commerce. We should also observe that in these markets very little, if any, fluid milk was shipped in and sold which was produced in other states. In other words, these were "intrastate" markets. The Agricultural Adjustment Administration attempted to sustain its license by contending that dairy products produced within the state were being sold in interstate commerce in competition with other dairy products produced in other states; that the price of fluid milk was so interrelated with the price of dairy products that the price of the former had a very substantial effect upon the price and movement of the latter and hence federal jurisdiction over the fluid milk market was legally justified. This contention was not accepted by the district courts and in the light of the decision of the Supreme Court read by Chief Justice Hughes in the Schechter case, decided May 17, 1935, it will be necessary, in order to sustain any milk license issued by the Agricultural Adjustment Administration to an intrastate market, to show that the transactions in fluid milk in such market "directly affect" interstate commerce. When the transactions in fluid milk do "directly affect" interstate commerce and this is clearly shown then the federal authority may assume jurisdiction.

There is nothing new or startling in these decisions of the court on intrastate commerce. We of the Agricultural Adjustment Administration legal staff have known that the authority of the national government could not prevail except under the Commerce Clause. But we believe our milk license to be fair to the distributors. We believe it corrects some of the evils existing in the industry. We believe it benefits the farmers. We know that under the license we can tell if he is paid in accordance with the uses of his product. This the farmer has never been able to ascertain before. If he sells on the use basis he is legally entitled to know how his product is used. Only by government regulation can he secure this information. His cooperative association may get this information for him if the distributor to whom it sells is willing to furnish it but the association cannot legally compel the distributor to disclose the use he has made of the product. Distributors will not, as a usual rule, furnish this information to the cooperative association for fear that such information may fall into the hands of a competitor. Considering these benefits it may be said of the licenses that they have set a standard for the industry which all distributors should be willing to

meet. Under these circumstances licenses of intrastate markets have been promulgated. And in some of the intrastate markets where restraining orders have been issued preventing the enforcement of the license the principle of the license is still retained by the industry and is used by the distributors to govern and regulate the market. In one large market the distributors have believed that the license controlled an intrastate market not directly affecting interstate commerce and yet notwithstanding the legal doubts these distributors have asked for the continuance of the license.

In interstate markets, such as Louisville, Boston and Chicago, the Agricultural Adjustment Administration milk license rests upon a very different basis of fact. In markets such as these a very substantial volume of the milk sold in the sales area is produced outside the state and is transported into the sales area from other states.

In one case at Chicago the district judge sustained the federal milk license while in other cases in the same district another district judge held the license to be invalid. The basis of the opinions in the later cases was that the license is an effort on the part of the national government to control the production of milk. The judge concluded that the production of milk was not in "interstate commerce" and, therefore, he held the Chicago license invalid. The federal milk license is not an effort to control production. The judge was mistaken as to the facts. No dairy farmer is prevented from producing and selling all the milk he desires to produce and sell. It is true that the Chicago license, as do many others, included in its terms the base and surplus plan of marketing milk and also contained provisions for the establishment of basis equitable among the farmers. We found that this plan had been in effect on the Chicago market for several years. In order not to disrupt the market and to assure to the dairy farmer his fair share of the price for fluid milk the base and surplus plan was included in the license. We have milk licenses that do not contain the base and surplus plan. The real aim and purpose of the license is to secure to the farmer a fair and reasonable price for his product in accordance with its use. In doing this we eliminate some of the evils I have mentioned which exist in the marketing of the product. There was no provision in the Chicago license which attempted to license the producers. The producers knew in advance, however, that they would be paid for their base milk a price which is a blend of the fluid milk price and of the cream, or Class II price, and for their excess milk a price based more directly on the butter market. The base and surplus plan is a method of distributing among farmers the proceeds derived from the sale of their product.

This same mistake of fact as to the dominant purpose and aim of the federal milk license also appears in an opinion rendered by another district judge. It may be that the record before him does not "clearly and accurately" set forth the facts. Apparently these facts have not been made clear to the courts (1) the purpose of the base and surplus plan and (2) the necessity for the equalization account as administered by the market administrator. Equalization of the cost of milk among distributors does not require any distributor to divide his profits made from the distribution of the product with any other distributor. The function of the equalization account is (1) to eliminate discriminations among producers and (2) to eliminate unfair practices and discriminations among distributors. If a dairy farmer sells his milk to a distributor whose business is largely manufacturing he can only be paid the value of his product for this use. If he sells to a distributor doing a large fluid business then he should receive the value of his product for this use. If the distributors pay in accordance with the use value of

the product some farmers will receive a price lower than that paid to other farmers for a product the same in quality. To remove this discrimination as between producers is the main function of the equalization account.

But let us now consider the problem from the distributor's standpoint. What does the fluid milk distributor usually do? The distributor of fluid milk does not always pay a price which is equivalent to the full fluid milk use value of the product but something less. The distributor, with a manufacturing business, in order to keep his supply of milk, is compelled to meet his competitors' price. But how can such a distributor make up the difference in the value of the product for his use and the price he has been compelled to pay to retain his supply? Need I discuss the use of surplus milk to build up fluid milk sales by cutting the retail price? Under the circumstance above outlined we maintain that the "trade practice" of buying an article of commerce from dairy farmers who may be termed "willing vendors" can and very often does result in "unfair practices". The soundness of this statement I believe I can establish to the satisfaction of the courts by a clear showing of the facts. This then is the second main purpose of the equalization account. It has eliminated and will eliminate unfair practices among distributors by placing all upon an equal competitive basis.

I have said that the fixing of minimum prices by governmental authority is necessary because milk is sold on the use basis and because the industry is affected by factors peculiar to itself. It is not necessary to say more on the question of fact. In order to win the cases before the courts involving federal milk licenses the facts must be clearly and accurately presented of record for the consideration of the judge.

One important problem which arises in all cases is the jurisdiction of the United States Government. Does the national government possess, under the Commerce Clause, the authority to fix fair and reasonable prices to be paid dairy farmers for their product moving in interstate commerce? In a very recent case the court said:

> "The question for decision is whether the Federal Constitution prohibits a state from so fixing the selling price of milk".

In its opinion the court quoted certain passages from prior decisions and then said:

> "Thus has this court from the early days affirmed that the power to promote the general welfare is inherent in government. Touching the matters committed to it by the Constitution the United States possesses the power, as do the states in their sovereign capacity touching all subjects jurisdiction of which is not surrendered to the Federal Government, * * * ".

In upholding the authority of the state to fix selling prices for milk, the court also said:

> "Price control, like any other form of regulation, is unconstitutional only if arbitrary, discrimin-

> atory or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty."

It behooves the farmers to ask only for fair and reasonable prices, and not prices which may be shown to be arbitrary and discriminatory.

But we are not compelled to rely wholly upon this recent case. In an earlier case which involved the constitutionality of a statute regulating the purchase of grain from producers the court stated:

> "That is, the state officer may fix and determine the price to be paid for grain which is bought, shipped, and sold in interstate commerce. That this is a regulation of interstate commerce is obvious from its mere statement.
>
> "Nor will it do to say that the State law acts before the interstate transactions begin. It seizes upon the grain and controls its purchase at the beginning of interstate commerce. * * *
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> "It is alleged that such legislation is in the interest of the grain growers and essential to protect them from fraudulent purchasers and to secure payment to them of fair prices for the grain actually sold. This may be true, but Congress is amply authorized to pass measures to protect interstate commerce if legislation of that character is needed. The supposed inconveniences and wrongs are not to be redressed by sustaining the constitutionality of laws which clearly encroach upon the field of interstate commerce placed by the Constitution under federal control."

We know that the State of Massachusetts cannot fix a price for milk and enforce the payment of its price to farmers residing in Vermont. Also that Vermont cannot fix and enforce the payment to producers of a price for milk which interferes or obstructs its free movement in interstate commerce.

In the light of the above facts and considering what was said by the court in the cases referred to it seems to us that the Federal Government possesses the necessary authority under the Commerce Clause to fix fair and reasonable prices, if the price paid may be said to fall within interstate commerce the control of which is committed under the constitution to the United States.

Our real problem is to determine the jurisdiction of the United States government, that is, where commerce between the several states begins and where it ends. The court has said:

> "Interstate commerce is a practical conception and what falls within it must be determined upon consideration of established facts and known commercial methods".

In one case involving a milk license the district judge said that:

> "It is settled law that the purchase of a commodity in one state for the purpose of transporting it to another state is a transaction in interstate commerce within the Commerce Clause and not subject to burdens imposed by state regulations".

This opinion is supported by the cases to which I have just referred. If this be the law, may we conclude that the act of purchasing the milk in one state for shipment to market in another state is the beginning of interstate commerce and the beginning of Federal jurisdiction.

Our next problem is to determine how far does the Federal jurisdiction extend, that is, where does interstate commerce end? A study of the utility cases may throw some light upon this subject and may assist us to arrive at a correct solution. We know that the transportation of gas through pipe lines from one state to another is interstate commerce and that the state, under the guise of regulating rates to be paid by consumers, cannot place a direct burden upon such commerce.

The Supreme Court, in a case involving local rates for gas, stated:

> "But in no proper sense can it be said, under the facts here disclosed, that the sale and delivery of gas to their customers at burner-tips by the local companies operating under special franchises constituted any part of interstate commerce. * * *
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> "Interstate movement ended when the gas passed into local mains."

If this same principle is applied to milk then it would appear that the interstate movement of the milk ends when the product comes to rest in the sales area in the hands of the local distributor for sale to consumers. If this is the correct rule to apply to milk then the Federal Government cannot exercise any control over the retail selling price of fluid milk in the local market. This function, if exercised, would appear to be left to the states. The local distributor is subject to the authority of the state milk control board with respect to fair and reasonable resale prices the same as the local gas company is subject to the local utility commission with respect to its rates.

Within the limits of its jurisdiction how far may the Federal Government go in controlling intrastate transactions upon the ground that they affect interstate commerce. The Supreme Court had occasion very recently to review this question in the Schechter case. It said:

> "The power of Congress extends not only to the regulations of transactions which are part of interstate commerce, but to the protection of that commerce from injury. It matters not that the injury may be due to the conduct of those engaged in intrastate operations."

With respect to the distinction between direct and indirect effect it stated:

> "The precise line can be drawn only as individual cases arise, but the distinction is clear in principle."

It illustrated direct affect by railroad cases and said:

> "The fixing of rates for intrastate transportation which unjustly discriminate against interstate commerce."

The intrastate price of milk certainly has a direct effect upon the interstate commerce in milk. We know that if it cost more to produce milk in Massachusetts so the Massachusetts price is above the price of milk in adjoining states, plus the cost of transportation to Boston, the farmers in Massachusetts will have difficulty in disposing of their product at such a price. And there is very little if anything, the State of Massachusetts can do to aid them. A review of the recent history of milk control in the State of New York will establish these facts. If the interstate commerce in milk is to be under government regulation and control in the interest of the industry in the Boston market, then this control must extend to the entire market and to those engaged in intrastate operations. There is only one government having the necessary authority to control the entire market and that government is the Government of the United States under the Agricultural Adjustment Act. Where, as here, the intrastate transactions in fluid milk have a direct effect" upon interstate commerce the state's authority must give way to control by the Nation.

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